IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 233

JAMES J. WALDRON,

Petitioner,

—against—

MOORE-McCORMACK LINES, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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The petition adequately sets forth the citation of the Court of Appeals' opinion, the fact that the District Court's opinion is unreported, and the jurisdictional requisites.

Question Presented

With "no authority to the contrary" (A8), should the Court review the Second Circuit's affirmance, based upon "a uniform course of judicial opinion" and "sound reason" (A9), that vacuous opinion testimony was insufficient to permit a finding that the otherwise seaworthy vessel became less than reasonably fit to dock solely by virtue of a non-negligent order that 2 men put out another mooring line?

Statement

The relevant facts, set forth in the Court of Appeals' opinion (A2-4), are that while the 11 minute docking operation of the fully, properly, competently manned ship was proceeding with requisite dispatch and while all other members of the docking gang were urgently busy with other mooring lines, plaintiff fell while he and another exceptionally strong, capable seaman were putting out another line ordered by the third mate. The general verdict for defendant implicitly rejected plaintiff's claims that the 2 man order was negligent and that the deck was unseaworthy. Plaintiff did not contend that any of the vessel's equipment was deficient. The Court of Appeals affirmed dismissal of plaintiff's claim, based solely upon an *in vacuo* opinion,[1] that use of the 2 available seamen to put out the additional line caused the ship to become unseaworthy.

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[1] The petition exceeds the record by inferring nonexistent testimony that, under the prevailing circumstances, use of 2 men was "an unsafe operation", "an unsafe method", "a dangerous condition" arising from "nonuse or misuse of ship's personnel", "insufficient manpower", "shortage of personnel". The Court of Appeals emphasized by quotation (A2) that the only evidence concerning the propriety of using 2 men was an opinion that "safe and prudent seamanship would call for" (26a) "three or four men" (83a). The Court also emphasized (A4) that this opinion was elicited, over objection (27-28a), by a hypothetical question which expressly excluded (45-46a) "twenty-five common factors which the person in charge of this operation would necessarily have to take into consideration in order to safely dock the ship" (44a) and which "would have a bearing upon whether what the mate did was safe, prudent and seamanlike" (45a).

Argument

Finding "no authority to the contrary" (A8), the Court of Appeals expressed belief that its decision is "based not only on a uniform course of judicial opinion but also on sound reason" (A9). Although the petition initially suggests that the decision conflicts with some by this Court and other courts of appeal, it eventually concedes (Pet. 15) that the question sought to be raised "has never been dealt with directly by this Court" and "has been determined directly" by only one other assertedly conflicting appellate decision, *American President Lines* v. *Redfern*, 345 F. 2d 629 (9 Cir. 1965). As stated below, *Redfern* involved "a stuck valve that could only be 'broken' by the use of tools or several men" (A7), neither of which were furnished. *Redfern*, dealing with basically unseaworthy equipment which could only be made reasonably fit by unprovided tools or manpower, obviously does not conflict with the decision below and is not even apposite. This is further clarified by the unreported memorandum opinion of the California District Court which, without mentioning any lack of tools or manpower, simply held "that the vessel is unseaworthy in that the low sea suction valve on the port side was stuck or frozen, constituting an unseaworthy condition of the ship's equipment".

The notion that oblique decisional conflicts exist is dispelled by the opinions upon which petitioner relies.[2] Unlike

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[2] Petitioner cites *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96 (1944); *Crumady* v. *The J. H. Fisser*, 358 U. S. 423 (1959); *Boudoin* v. *Lykes Bros. S.S. Co.*, 348 U. S. 336 (1955); *Ferrante* v. *Swedish American Lines*, 331 F. 2d 571 (3 Cir. 1964), dismissed 379 U. S. 801; *Thompson* v. *Calmar Steamship Corp.*, 331 F. 2d 657 (3 Cir. 1964), cert. denied 379 U. S. 913; *Hroncich* v. *Ameri-*

Mahnich, there was no use of defective gear instead of available safe gear. Even if, contrary to "the traditional triple concept of unseaworthiness" (A8), the doctrine precluded any possible distinction between gear and men, the record establishes that "all the other men were occupied with urgent tasks connected with the other lines" (A3) and hence there was no failure to use available manpower. *Crumady* is factually the reverse of *Redfern* in that, as the Court of Appeals recognized (A7), *Crumady* involved basically sound equipment made unseaworthy by maladjustment. *Boudoin* dealt with a seaman so vicious as to be incompetent. Here, it is not disputed "that the crew including the officer who gave the order were in all respects competent to perform their duties" (A2). *Ferrante,* alternatively decided on negligence grounds, involved improper use of gear so as to create an unseaworthy cargo draft and *Thompson,* also decided on alternative negligence grounds, involved improper use of makeshift equipment which created an unseaworthy condition. *Hroncich* and *Scott* are unseaworthy stowage cases and *Blassingill* is another unseaworthy cargo draft case.

None of these opinions definitively answers petitioner's abstract question of whether an assumed "improper work method"[2] constitutes unseaworthiness, although some of the cases do hold that an improper method may create a *condition* which *condition* is unseaworthy. Presumably that

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can President Lines, 334 F. 2d 282 (3 Cir. 1964); *Scott* v. *Isbrandtsen Co.,* 327 F. 2d 113 (4 Cir. 1964); and *Blassingill* v. *Waterman Steamship Corp.,* 336 F. 2d 367 (9 Cir. 1964).

[2] As stated in the first footnote, the record is devoid of any testimony that, under the prevailing circumstances, the mate's order was improper or created an improper condition.

is the intended meaning of the dictum in *Morales* v. *City of Galveston*, 370 U. S. 165, 170 (1962), emphasized in the petition (Pet. 8).

As the Court of Appeals pointed out (A9), petitioner's claim ignores the clarifying opinion in *Mitchell* v. *Trawler Racer*, 362 U. S. 539 (1960), that a seaworthy vessel need not be so "accident proof" as to be potentially capable of withstanding every exigency; the "standard is not perfection but reasonable fitness", 362 U. S., p. 550, "a relative concept dependent in each instance upon the circumstances in which its fitness is drawn into question", *Lester* v. *United States*, 234 F. 2d 625, 628 (2 Cir. 1956), dismissed 352 U. S. 983. Thus, seaworthiness cannot possibly be put in issue by the *in vacuo* opinion testimony upon which petitioner wholly relies.

The peculiar record is too feeble to squarely raise any important, recurrent question for determination by this Court and petitioner's assertion that the case requires the Court's supervisory intervention is too insubstantial to bear comment.

Conclusion

The petition for certiorari should be denied.

Respectfully submitted,

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